Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY L. BALDWIN,
Petitioner,

v.

THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM, et al.,
Respondents.

On Petition for Writ of Certiorari
To The Court of Appeal First Circuit for the State of Louisiana, Writ Denied Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Louisiana's anti-discrimination statutes are pre-empted by Title VII of the Civil Rights Act of 1964, as amended, if the state statutes are in direct conflict with Title VII and/or an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as outlined in the Civil Rights Act of 1991.

PARTIES TO THE PROCEEDING

Petitioner, who was the plaintiff / appellee below, is Jerry Lee Baldwin.

Respondents, who were the defendants / appellants below, are The Board of Supervisors for the University of Louisiana System, and Nelson Schexnayder, individually, and in his capacity as Director of Athletics for the University of Louisiana at Lafayette.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions the Court to issue a writ of certiorari to review the decision and final judgment of the Court of Appeal for the First Circuit of the State of Louisiana, writ having been denied by the Supreme Court of Louisiana. This case affords the Court the opportunity to correct the lower court's misapplication of Title VII in employment discrimination suits filed in Louisiana's state courts and, in so doing, re-affirm the sanctity and supremacy of Title VII over conflicting state law.

OPINION AND JUDGMENT BELOW

The opinion of the Court of Appeal for the First Circuit State of Louisiana is not designated for publication, however, is reproduced at App. 2A-52A.[1] The Supreme Court of Louisiana's denial of discretionary review is reproduced at App. 53A-54A.[2]

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1 *Baldwin v. Board of Supervisors for Univ. of Louisiana System, et al.*, 2008-2359, pps. 19-20 (La.App. 1 Cir. 6/30/09) 11 So.3d 1247, not designated for publication.
2 Baldwin v. Board of Supervisors for Univ. of Louisiana System, et al., 2009-C-1919 (LA 2009).

STATEMENT OF JURISDICTION

On December 18, 2009, the Supreme Court of Louisiana entered an order denying discretionary review of the Judgment entered by the First Circuit Court of Appeal on June 30, 2009, rehearing application denied, July 14, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Supremacy Clause of the United States Constitution provides, in pertinent part, that "the Laws of the United States ... shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2.

The Civil Rights Act of 1964, as amended, Section 708 of Title VII states as follows:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment

> provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title. 78 Stat. 262, 42 U.S.C. 2000e-7.

Section 1104 of Title XI states as follows:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof. 78 Stat. 268, 42 U.S.C. 2000h-4.

Other pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., at App. 75A-88A, and Louisiana's Employment Discrimination Laws, La. R.S. 23:301, et seq., are lengthy and reprinted at App. 89A-94A.

INTRODUCTION

This case involves a question of exceptional national importance: whether state legislatures and state courts may override and/or circumvent the judgment of Congress concerning employment discrimination based on race. Simply put, they may not. This Court has made it clear that the purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 – 430, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). To that end, Congress has indicated, in two sections of the 1964 Civil Rights Act, 708 and 1104, that state laws will be pre-empted if they conflict with federal law. Section 708 of Title VII provides:

> "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or *permit the doing of any act which would be an unlawful employment practice under this*

title." 78 Stat. 262, 42 U.S.C. 2000e-7 (emphasis added).

Section 1104 of Title XI, applicable to all titles of the Civil Rights Act, establishes the following standard for preemption:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law *unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof*." 78 Stat. 268, 42 U.S.C. 2000h-4. (emphasis added)

To determine if a state statue is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, Congress' intent to do so must be ascertained. *California Federal S.& L. ASSN. v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). "Federal law may supersede state law in several different ways." Id. For instance, "where Congress has not completely displaced a state regulation, federal law may nonetheless

pre-empt state law to the extent it actually conflicts with federal law." Id. at 281. "Such a conflict occurs because 'compliance with both federal and state regulations is a physical impossibility,' Id. (citation omitted), or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Therefore, if Louisiana's law permits -- or is interpreted as to permit -- the doing of an act which would otherwise be an unlawful employment practice under Title VII, that particular state law should be pre-empted. 78 Stat. 262, 42 U.S.C. 2000e-7.

In contravention of these clear directives, in the instant case, Louisiana's First Circuit Court of Appeal undermined Congress' clear purpose and objective in applying the *Price Waterhouse*[3] rule instead of applying Title VII, as amended by the Civil Rights Act of 1991, to the facts of Petitioner's claim. Based on the precedence set by the Louisiana First Circuit Court of Appeal, in Louisiana today, an employer who makes an adverse employment decision based partly on discriminatory reasons can completely avoid any

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3 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 268 (1989)

liability.[4] The imposition of this standard upon discrimination claimants is in direct conflict with the statutory enactments of Congress, i.e., Civil Rights Act of 1991, and subsequent rulings by this Court. Accordingly, the lower court's holding in this matter should not be allowed to stand.

STATEMENT OF THE CASE

I. Procedural Background

To satisfy all administrative prerequisites for bringing this action, Plaintiff/Petitioner filed a complaint with the Equal Employment Opportunity Commission ("EEOC") against Defendants / Respondents. Afterwards, the EEOC issued a "Notice of Right to Sue" letter related to claims arising under Title VII of the Civil Rights Act of 1964, as amended. Accordingly, Petitioner filed suit on November 26, 2002 in the Federal District Court for the Western District of Louisiana, Lafayette-Opelousas Division, Docket CV02-2440 L-O. In

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4 *Baldwin v. Board of Supervisors for Univ of Louisiana System, et al* , 2008-2359, pps. 19-20 (La.App. 1 Cir. 6/30/09) 11 So.3d 1247, not designated for publication; *Morgan v New Orleans Public Facility Management, Inc* , 97-0211 (La. App. 4 Cir. 11/26/97) 703 So.2d 182, 184., App. 2A-52A.

that suit, Petitioner asserted claims for damages for violations of his civil rights as well as breach of contract and tort claims coming under state law. However, upon Respondents' expression of their intent to assert their Eleventh Amendment right to prohibit Petitioner's various state law claims from being heard in Federal Court, Petitioner filed an Amended Complaint in Federal Court seeking damages only for his federal civil rights claims.

On June 13, 2003, the Respondents filed their Answers to the original and amended complaints. Confirming their prior expressed intentions, the Respondents asserted their Eleventh Amendment right prohibiting suit on Petitioner's state law claims in Federal Court. Therefore, on July 22, 2003, Petitioner filed his claims in the Nineteenth Judicial District Court in the Parish of East Baton Rouge, Louisiana, asserting and seeking recovery for his state law claims sounding in breach of contract and tort. After defeating Respondents' Exception of Lis Pendens on September 29, 2003, and after the federal proceedings were administratively terminated so that the parties could consolidate the case at bar in one proceeding, Petitioner sought leave of court and supplemented his

Petition to allege race-based discrimination against the Respondents.

On March 21, 2005, Respondents moved for summary judgment on all of the claims Petitioner asserted in his Amended Petition. On January 30, 2006, the trial court denied the summary judgment on all claims except Petitioner's racial discrimination claim, sending this case to the First Circuit Court of Appeal for the first time. Thus, while Petitioner's claims for intentional and negligent infliction of emotional distress, tortious interference with contract, breach of contract and abuse of rights remained firmly intact, Petitioner filed his Notice of Appeal on March 21, 2006 to challenge the trial court's defeat of his discrimination claim by summary judgment.

On appeal, Petitioner successfully argued that the Respondents' stated reasons for his firing were merely pretextual. Following the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Court of Appeals correctly found that Petitioner had established that there were many material issues of fact yet to be determined by the trial court with regard to the race discrimination claim. Therefore, the First

Circuit Court of Appeal reversed the trial court's decision dismissing Petitioner's discrimination claim on summary judgment and remanded the matter to the trial court for trial on the merits. *See Baldwin v. Board of Supervisors for University of Louisiana System*, 2006-0961, pp. 11-12 (La.App. 1 Cir. 5/4/07), 961 So.2d 418, 424-25. The case came up for trial in the fall of 2007, running from October 9th through the 18th. At the conclusion of trial, the twelve member jury found in favor of Petitioner on his claims of race discrimination, breach of contract abuse of rights and interference with contract, and negligent infliction of emotional distress. On April 11, 2008, the trial court entered a Corrected Final Judgment affirming the trial court's awards and ordering that Petitioner was entitled to an award of attorneys' fees and all appropriate interest. Respondents' Motion for Judgment Notwithstanding the Verdict and, Alternatively, Motion for New Trial was denied by order entered July 8, 2008.

The Order for Appeal was filed into the record on August 28, 2008. The First Circuit Court of Appeal conducted oral arguments in this matter on March 31, 2009 and rendered its Judgment and Written Opinion on June 30, 2009, vacating the trial court's Judgment and remanding same

for a new trial.[5] After an application for rehearing was denied, Petitioner filed an application for writs with the Supreme Court of Louisiana assigning as error, among other matters, that the First Circuit committed error when it failed to apply the 1991 amendment to the Civil Rights Act of 1964, and this Court's subsequent decisions, to Petitioner's mixed motive claim.[6] The Supreme Court of Louisiana denied discretionary review of the matter on December 18, 2009.[7] Accordingly, this writ application ensued.

II. Statutory Background

Under Louisiana law, it is unlawful for an employer to "intentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin." LSA-R.S. 23:332 A(1) (emphasis added). Likewise, under federal law, it is also

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5 *Baldwin*, 2008-2359, (La.App. 1 Cir. 6/30/09) 11 So.3d 1247, not designated for publication, App. 2A-52A.

6 Id. at App.32A -40A.

7 Baldwin v. Board of Supervisors for Univ. of Louisiana System, et al., 2009-C-1919 (LA 2009), App. 53A.

unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. Sec. 2000e-2 A(1), as amended, (emphasis added). Accordingly, because of the commonality between federal and state anti-discrimination laws, Louisiana state courts have routinely relied upon the federal courts' interpretation of federal statutes to resolve similar questions concerning Louisiana statues and the proper burden of proof sequence.[8] However, this all changed after *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 268 (1989), and the enactment of the Civil Rights Act of 1991.

In *Price Waterhouse,* this Court found that an accounting firm's decision to deny partnership to a female candidate was in part based on her sex. However, the Court held that the employer could avoid liability altogether just by showing that it would have made the same employment decision even if it had not considered the candidate's sex. As a result of the Court's holding, an employer

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8 *Hicks v. Central Louisiana Electric Company, Inc.*, 97-1232, p.3 (La. App. 1 Cir. 5/15/98), 712 So.2d 656, 658

could completely avoid liability even though the employer acted in part for discriminatory reasons.

Notwithstanding the Court's holding, two years after *Price Waterhouse*, Congress, via the Civil Rights Act of 1991, changed the rule by providing that a violation of Title VII has occurred once a showing is made that race, color, religion, sex, or national origin was a motivating factor in the employment decision. Clearly, the purpose and the objective of Congress when it enacted the Civil Rights Act of 1991 was to reverse the effect of *Price Waterhouse* which was believed to have restricted the rights of individuals seeking to protect themselves from employment discrimination.[9]

Even though the Civil Rights Act of 1991 changed the rule, there still existed a question as to when a party was entitled to a "mixed motive" jury instruction.[10] The question stemmed from Justice O'Connor's concurring opinion in *Price Waterhouse* where she wrote that "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by

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9 A. Larson: Employment Discrimination § 8.09 (Matthew Bender).
10 Id.

direct evidence that an illegitimate criterion was a substantial factor in the decision."[11] However, in *Desert Palace, Inc. v. Costa*, 539 U.S.90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 91 FEP 1569 (2003), this Court answered the aforementioned question when it held, after analyzing the Civil Rights Act of 1991, that direct evidence is not required and that the "plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice' to obtain a mixed motive instruction." In *Desert Palace*, the Court, relying on the language in the 1991 amendments to the Civil Rights Act of 1964, was unwilling to depart from the traditional rule that does not differentiate between the value of direct and circumstantial evidence, giving both equal evidentiary value. [12]

Despite the Civil Rights Act of 1991, which was enacted to change the rule in *Price Waterhouse*, and despite this Court's clear holding in *Desert Palace*, Louisiana state courts still hold that, "[f]or mixed motive claims in

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11 A. Larson: Employment Discrimination § 8.09 (Matthew Bender).
12 Id.

particular, the shifting burden analysis outlined in *Price Waterhouse* is an appropriate guide, not the amended federal statute [and its corresponding federal jurisprudence interpreting same]."[13]

REASONS FOR GRANTING THE PETITION:

This Case Presents a Vital Question of National Importance Regarding Civil Rights.

By the enactment of the civil rights statutes of the 1960s, most notably, Title VII of the Civil Rights Act of 1964, and its corresponding amendments, namely the Civil Rights Act of 1991, this country determined that employment discrimination based on race, color, religion, sex, or national origin is repugnant to the Constitution and to the values and freedoms which form the cornerstone of our social order. As a result, state and federal courts across this great country have become sanctuaries of hope for those in search of justice after allegedly being marginalized and/or disenfranchised in their place of employment because of

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13 *Baldwin*, 2008-2359, pps. 20-21 (La.App. 1 Cir. 6/30/09) 11 So.3d 1247, not designated for publication.

discriminatory treatment based on illegitimate criteria. However, all too often, this has not been the case in Louisiana. Louisiana has proven to be a reluctant, if not at times an unwilling participant in the process. The Louisiana First Circuit's failure to respect federal law in the present matter is reminiscent of an era of civil rights transgressions that no one should ever forget.

Notably, not only did the lower court fail to honor federal law, it ignored it all together. The underlying statue upon which Plaintiff's discrimination claim was based was not Louisiana's anti-discrimination laws, but Title VII of the Civil Rights Act of 1964, as amended.[14]

As described above, to satisfy all administrative prerequisites for bringing a Title VII action, after Respondents fired Petitioner in 2002, Petitioner filed a complaint with the Equal Employment Opportunity Commission ("EEOC") against Respondents. In the complaint, Petitioner alleged that Respondents

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14 *Gearld, et al. v. Martin-Marietta Michoud Aerospace Corporation, et al.*, 93-1399, p.2, (La.App. 4 Cir. 12/30/93), 630 So. 2d 920, 922.

terminated his employment because he was black, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. After the EEOC issued a "Notice of Right to Sue" letter related to claims arising under Title VII of the Civil Rights Act of 1964, as amended, Petitioner filed suit in Federal Court in the Western District of Louisiana, Lafayette-Opelousas Division, Docket Number CV02-2440 L-O.

In an effort to adjudicate all causes of action arising out of the transaction and occurrence plead in the aforementioned suit, Petitioner not only sought damages for violations of his civil rights, but also sought damages for breach of contract and appropriate damages in tort. However, in discussions with Respondents and in Respondents' Answer to the Petitioner's Complaint, Respondents asserted their Eleventh Amendment right effectively prohibiting suit on Petitioner's various state law claims in Federal Court. Accordingly, Petitioner filed his state law claims in state court which sought damages for breach of contract and appropriate damages in tort. It was not until the federal matter was administratively terminated, that Petitioner amended the matter at bar to include his discrimination claims.

Most importantly, at all times during the proceedings in trial court, the parties and the trial court judge relied on the federal courts' interpretation of federal statues to adjudicate Petitioner's discrimination claims - the jury instructions read to the jury and the jury interrogatories provided to the jury were all based on the federal courts' interpretation of Title VII of the Civil Rights Act of 1964, as amended. Consequently, in light of the fact that state courts have concurrent jurisdiction with federal courts to hear Title VII claims, the lower court's application of Louisiana's anti-discrimination law to Plaintiff's discrimination claim was a mistake.

Like all courts in this country, the decisions of the lower court "should be made by the application of known principles or laws without the intervention of discretion."[15] That is, the lower court in this matter should adhere to the "rule of law." If not, what are the citizens of the State of Louisiana to do? Besides his faith in God, this Court is Petitioner's only hope.

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15 The legal principle called the "Rule of law," defined by Black's Law Dictionary

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX

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APPENDIX : 1A

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Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. 75A

Louisiana's Employment Discrimination Laws, La. R.S. 23:301, et seq. 89A

JERRY LEE BALDWIN

v.

THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM, THE UNIVERSITY OF LOUISIANA AT LAFAYETTE, NELSON SCHEXNAYDER, INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF ATHLETICS FOR THE UNIVERSITY OF LOUISIANA AT LAFAYETTE.

No. 2008 CA 2359.

Court of Appeals of Louisiana, First Circuit.

June 30, 2009.

Not Designated for Publication

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, IN AND FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DOCKET NO. 509,900, HONORABLE DONALD R. JOHNSON, JUDGE PRESIDING.

ERIC L. REGISTER, G. KARL BERNARD, and MARSHALL J. SIMIEN, Jr., Counsel for Plaintiff/Appellee, Jerry Lee Baldwin.

LAWRENCE E. MARINO, STEPHEN J. OATS, ROBIN L. JONES, GEORGE O. LUCE,

Special Asst. Attorneys General, Counsel for Defendants/Appellants, Board of Supervisors for the University of Louisiana System and Nelson Schexnayder.

Before PARRO, McCLENDON, and WELCH, JJ.

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McCLENDON, J.

Plaintiff, Jerry Lee Baldwin, filed suit against defendants, the Board of Supervisors for the University of Louisiana System (Board), the University of Louisiana at Lafayette (ULL), and Nelson Schexnayder, individually and in his capacity as Director of Athletics for the ULL, alleging several causes of action stemming from termination from his employment. After finding merit in some of the claims, the jury awarded over two million dollars in damages. A judgment in favor of plaintiff was rendered against defendants, with the exception of ULL. All claims against ULL as a separate entity from its supervisor, the Board, were dismissed. The remaining defendants appealed. Finding more than one consequential error that interdicted the fact finding process, we vacate the judgment and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

In December of 1998, Mr. Baldwin was employed as the head football coach at ULL. His formal contract was approved by the Board in April of 1999. On November 26, 2001, after three losing football seasons, Mr. Baldwin was relieved of his duties as head coach. However, his salary was paid throughout the remaining term of his contract.

On July 21, 2003, Mr. Baldwin filed a suit alleging breach of contract, intentional and negligent infliction of emotional distress, tortious interference with a contract, and abuse of rights. By an amending and supplemental petition filed on September 17, 2004, Mr. Baldwin alleged racial discrimination.

On March 21, 2005, the defendants filed a motion for summary judgment asking that plaintiffs claims be dismissed. On the discrimination claim, the trial court, in its oral reasons, found "some issues or claims that are disputed, but I'm of the opinion ... that the system of the administration at the university separated its employment relationship with Mr. Baldwin for reasons that are not illegal or unlawful." A partial judgment dismissing the racial discrimination claim with prejudice was signed on November 21, 2005. By an order

signed on February 24, 2006, the trial court granted a motion to certify as final the partial judgment dismissing the racial discrimination claim and plaintiff appealed that judgment. Subsequently, the trial court denied defendants'

motion for summary judgment on the claims of intentional or negligent infliction of emotional distress, tortious interference with contract, and breach of contract. The ruling on the claim of abuse of rights was unclear. Mr. Baldwin appealed the grant of the summary judgment dismissing his racial discrimination claim.

On appeal, Mr. Baldwin asserted that ULL's reasons for the firing were pretextual, and that the termination was actually based on race. In reviewing the correctness of the partial summary judgment on appeal, we followed the analysis from McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Initially, we found that Mr. Baldwin had presented to the trial court a prima facie case of racial discrimination. Specifically, he offered evidence to show that he was an African-American, his background as a high school football coach and assistant coach at Louisiana

State University (LSU) qualified him for the position of head coach at ULL, he was removed from his duties, and he was replaced by a white male.

We then noted that, to counter Mr. Baldwin's evidentiary showing on the motion for summary judgment, defendants offered what they considered to be legitimate and nondiscriminatory reasons for the removal. Defendants pointed to the three losing seasons comprising Mr. Baldwin's tenure and the significant drop in game attendance, particularly in light of a pending NCAA rule that required a higher level of attendance for ULL to maintain its Division 1-A status. Defendants also argued that the win/loss record and the low attendance combined to create a budget crisis that demanded an immediate change in the head football coaching position.

In response to ULL's counter, Mr. Baldwin argued to the trial court that the reasons offered by ULL were not the true reasons and were merely pretextual. As support, Mr. Baldwin highlighted evidence that he believed undermined ULL's claim of nondiscriminatory reasons.

After our review, this court held that Mr. Baldwin had established that many issues of material fact remained, and thus, the trial court

erred in granting the summary judgment dismissing the claim of racial discrimination. We reversed and remanded to the trial court for further proceedings. Baldwin v. Board of Supervisors for

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University of Louisiana System, 2006-0961, pp. 11-12 (La.App. 1 Cir. 5/4/07), 961 So.2d 418, 424-25.

After a trial on the merits of the claims, which was held between October 9-18, 2007, the jury found as follows:

On the claim of racial discrimination, the jury answered "no" to question 1 concerning whether the Board "terminated Plaintiff, Jerry Baldwin, because of his race." However, the jury answered "yes" to question 2 on whether "Coach Baldwin's race was a determining factor in his termination by the [Board]."

On the claim for breach of contract, the jury found in question 3 that the contract was breached, but found in question 4 that the breach was not in bad faith.

On question 5, whether the claim of abuse of rights had been proved, the jury answered "yes" to questions 5 b, 5 c, and 5 d, three of the valid bases for a finding of abuse of rights. The jury checked "yes" to a summary question

appearing at the end of the question 5, which directed the jury to respond affirmatively if it had answered "yes" to any one of the listed grounds in 5 a-d.

On the issue of interference with a contract, the form memorialized a "yes" by the jury to all of the interrogatories outlining the elements necessary for an affirmative finding on the claim, that is, 6 a-c. The verdict form on question 6 also contained a summary interrogatory that directed the jury to answer "yes," if it had answered "yes" to questions 6 a-c. The jury checked "yes."

On the issue of intentional infliction of emotional distress, the jury answered "no" to the interrogatories 7 a-c, comprising the elements of the claim, and "no" to the summary question, which again required an affirmative answer if 7 a-c had been answered in the affirmative.

On the issue of negligent infliction of emotional distress, the verdict form recorded a "yes" vote to all of the elements, questions 8 a-e, and "yes" to the same type of summary question.

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Finally, in question 9, the jury answered "yes" to whether the plaintiff suffered damages. Under question 10, listing the various categories

of damages, the jury awarded plaintiff a total of $2,002,676.37.1

After the jury verdict was read in open court, the defendants asked that the jury be polled. As a result of the poll, some inconsistencies in the verdict form were revealed.

When asked to recall their votes on question 6, the interference with a contract claim, one juror voted "no" to two of the requisite elements for the claim, one juror voted "no" to all of the element questions and to the summary question, and two jurors could not recall how they voted on question 6.

The polling on the negligent infliction of emotional distress claim, question 8, also produced a result inconsistent with the verdict form. Specifically, four jurors voted no to one or more of the requisite elements.

The judgment in "accordance with the jury's verdict" was rendered in "Open Court on October 18, 2007," and signed on April 4, 2008. After rendition, on January 2, 2008, defendants filed a motion to correct the verdict to conform to the jury polling. The motion was denied. Subsequently, defendants also filed a motion for a Judgment Notwithstanding the Verdict (JNOV) or for a new trial. In part, defendants

argued that the jury incorrectly found that the defendants had discriminated against Mr. Baldwin based on race. The trial court denied the motion. In the denying the motion, the trial court stated that the case was "almost totally about credibility" and the jury's assessment of the credibility. Defendants appealed.

On appeal, defendant-appellants assigned multiple errors to the jury's finding against defendants on various claims, including confusing or inconsistent responses in finding for plaintiff on the racial discrimination claim, and the lack of nine affirmative votes for the two claims covered in questions 6 and 8 of the verdict form. In addition, defendants assigned the following errors and argued that these errors prevented the

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jury from reaching a fair and impartial verdict, which requires reversal or possibly remand:

1. By allowing Dr. William Davis and Mr. Max Emfinger to testify as plaintiff's experts, the trial court abused its discretion;

2. By excluding testimony sought by defendants on the issue of firing practices at other schools, the trial court abused its discretion; and,

3. A structural error was committed when the trial court refused to grant defendants' peremptory strike to a black prospective juror who had an unresolved belief that she had been racially discriminated against by her white supervisor.

STANDARD OF REVIEW

On appeal, the appellate court uses the manifest error-clearly wrong standard of review for the findings of fact. Stobart v. State, Department of Transportation and Development, 617 So.2d 880, 882 (La. 1993). However, where the fact finding process has been tainted by some material legal or structural error that deprived the verdict or judgment of the presumption of correctness, and the record is complete, the appellate court reviews the record de novo and renders judgment on the record. Jones v. Black, 95-2530, p. 1 (La. 6/28/96), 676 So.2d 1067, 1067; McLean v. Hunter, 495 So.2d 1298, 1304 (La. 1986). Notwithstanding the preference for de novo review with a complete record, in fact-intensive cases with conflicting evidence, a preponderance of the evidence and a fair resolution of the issues may not be determinable from a cold record and may require a first-hand view of the witnesses presented at trial. See Jones, 95-2530 at p. 1, 676 So.2d at 1067; Savin

v. Allstate Insurance Company, 579 So.2d 453, 457-58 (La.App. 1 Cir. 1991). In those cases, the appellate court must decide whether a de novo review or remand for a new trial is more just and proper. Diez v. Schwegmann Giant Supermarkets, Inc., 94-1089, p. 7 (La.App. 1 Cir. 6/23/95), 657 So.2d 1066, 1070-71, writ denied, 95-1883 (La. 11/17/95), 663 So.2d 720; IP Timberlands Operating Company, Limited v. Denmiss Corporation, 93-1637, p. 35 (La.App. 1 Cir. 5/23/95), 657 So.2d 282, 304, writs denied, 95-1958, 95-1593, 95-1691 (La. 10/27/95), 661 So.2d 1348; see Adeola v. Kemmerly, 2001-1231, p. 9 (La.App. 1 Cir. 6/21/02), 822 So.2d 722, 728, writs

denied, 2002-2354 (La. 11/15/02), 829 So.2d 438 and 2002-2413 (La. 11/22/02), 829 So.2d 1054; Savin, 579 So.2d at 457-58.

DENIAL OF PEREMPTORY CHALLENGE

During the questioning of the prospective jurors, one of the candidates stated that she was a black female and that, as a state employee, she had been the victim of racial discrimination by her white supervisor. When asked if she could

set aside her discrimination experience, she answered, "yes."

Subsequently, the defendants asserted a peremptory challenge based on a possible conflict stemming from the candidate's unresolved claim of racial discrimination, which was so similar to Mr. Baldwin's. In response, Mr. Baldwin asserted a Batson challenge to the defendants' request to have the prospective juror excused. He argued that the candidate was being challenged based on her race. The trial court agreed with Mr. Baldwin and refused to excuse the candidate, who was then seated as a juror.

In Alex v. Rayne Concrete Service, 2005-1457, 2005-2344, 2005-2520, p. 15 n.11 (La. 1/26/07), 951 So.2d 138, 150 n.11, our supreme court held that LSA-C.Cr.P. art. 795C, governing Batson challenges in criminal cases, was applicable to civil cases.

Louisiana Code of Criminal Procedure article 795C states that:

C. No peremptory challenge made by the state or the defendant shall be based solely upon the race [or gender] of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race [or gender], and a prima facie case supporting that objection is made by the objecting party, the court may

demand a satisfactory [race or gender] neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.2 (footnote added)

Additionally, in Alex, 2005-1457, 2005-2344, 2005-2520 at p. 15, 951 So.2d at 150-51, the supreme court provided the following three-step analysis to be used in reviewing a Batson challenge to a peremptory strike:

First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge

on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensive reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices.

Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

The basis for the peremptory challenge or strike may be less than that required for a challenge for cause, but must be more than mere intuition or a "gut feeling." Alex, 2005-1457, 2005-2344, 2005-2520 at pp. 17 & n.12 & 18-19, 951 So.2d at 152 & n.12 & 152-53. The reasons offered should be deemed race-neutral unless a discriminatory intent was inherent in those reasons. State v. Burns, 98-0602, p. 20 (La.App. 1 Cir. 2/19/99), 734 So.2d 693, 704, writ denied, 99-0829 (La. 9/24/99), 747 So.2d 1114; State v. King, 604 So.2d 661, 666 (La.App. 1 Cir. 1992). Generally, the "possibility of bias in favor of plaintiffs is a racially neutral ground" for the peremptory challenge. Matthews v. Arkla Lubricants, Inc., 32,121, p. 20 (La.App. 2 Cir. 8/18/99), 740 So.2d 787, 801 (citing State v. King).

Because these challenges often revolve around factual determinations, the findings of the trial court are due great deference. Thus, the

trial court's rulings will not be overturned absent manifest error. Alex, 2005-1457, 2005-2344, 2005-2520 at p. 14 n.10, 951 So.2d at 150 n.10. If a Batson challenge is denied in error, the trial court commits a structural error, which impedes the right to a fair and impartial trial. Alex, 2005-1457, 2005-2344, 2005-2520 at pp. 22-24, 951 So.2d at 155-56. Similarly, if the trial court manifestly errs and wrongfully grants a Batson challenge, a defect in the jury selection process also occurs. Through the granting of the challenge, the party asserting a legitimate peremptory challenge may be subjected to juror bias and the same impediment to a fair and impartial trial may be erected as when a prospective juror is denied service. See Munch v. Backer, 2004-1136, pp. 4-5 (La.App. 4 Cir. 12/5/07), 972 So.2d 1249, 1251-52, writ denied, 2007-2477 (La. 3/7/08), 977 So.2d 909.

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After a review of the record, and the applicable law, it is clear that the peremptory challenge was not based on impermissible race discrimination, but rather on the "possibility of bias" or conflict caused by the candidate's discrimination experience. Matthews, 32,121 at p. 20, 740 So.2d at 801. We further note

that several other African-Americans were seated as jurors, and we find no evidence that African-Americans were being systematically excluded.

Certainly, the candidate's race was a fact involved in the unresolved claim, as was the race of the white supervisor. However, we find nothing in the record to support a prima facie showing that defendants' exercised a peremptory challenge solely on the basis of the candidate's race. It was the similarity of the claim, that is, a black, state employee who asserted unfair treatment by a white supervisor based on race, that raised the question of bias. In light of the similarity of the claims, the defendants asserted more than intuition or an unsupported feeling for their challenge. They had a reasonable basis to believe that the "possibility of bias" remained, despite the candidate's belief that she could put her experience aside during the trial. In addition, even if we assumed a prima facie showing, Mr. Baldwin did not sufficiently rebut the race-neutral reason asserted by defendants. Under these particular facts, defendants provided a plausible, specific, and legitimate race-neutral reason for the challenge, and the plaintiff failed to meet his burden to show purposeful discrimination. See Munch, 2004-

1136 at p. 4, 972 So.2d at 1251-52; Burns, 98-0602 at p. 20, 734 So.2d at 704.

Therefore, we find that the trial court was clearly wrong in granting the Batson challenge. More importantly, we recognize that, in this particular case, the defect in the jury selection appears to be the type of structural error that taints the fact-finding process and creates the possibility of impermissible prejudice against the defendants. See Munch, 2004-1136 at pp. 4-5, 972 So.2d at 1252; Alex, 2005-1457, 2005-2344, 2005-2520 at pp. 22-24, 951 So.2d at 155-56.

QUALIFICATION OF EXPERT WITNESS

Defendants assigned error to the trial court's qualification of two of plaintiff's witnesses, Mr. Max Emfinger and Dr. William Davis, as experts. Defendants argue that the trial court "failed to perform its 'gatekeeping' function of excluding unreliable and

irrelevant expert testimony." Specifically, defendants assert that Mr. Emfinger rated only high school players and not college players individually or as a team. Thus, defendants do not believe that Mr. Emfinger was qualified to

give his opinion on the competitiveness of the ULL team in question. As to Dr. Davis, defendants admit his expertise in the area of administration, but argue that he was not qualified as an expert in the method of terminating college football coaches or the consequences of firing versus allowing a coach to resign. According to defendants. Dr. Davis' opinion in those areas was a personal one that had not been researched, tested, or analyzed sufficiently to meet the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 LEd.2d 469 (1993) and State v. Foret, 628 So.2d 1116 (La. 1993), or Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174, 143 L.Ed.2d 238 (1999), which applied Daubert-Foret principles to all expert testimony, not only scientific opinion.

In Louisiana, LSA-C.E. art. 702 provides as follows:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Because LSA-C.E. art. 702 is virtually identical to its source provision in the Federal Rules of Evidence, Rule 702, the Louisiana Supreme Court adopted and applied the Daubert analysis, which allows a more flexible standard for determining admissibility while recognizing the detailed analysis in which the trial court must engage to satisfy its gatekeeping function. Foret, 628 So.2d at 1121-23. Under Daubert, the trial court is charged with the duty of performing a "gatekeeping" function to ensure that the expert testimony is not only relevant, but also reliable. Kumho Tire Company, Ltd., 526 U.S. at 152, 119 S.Ct. at 1176; Devall v. Baton Rouge Fire Department, 2007-0156, p. 3 (La.App. 1 Cir. 11/2/07), 979 So.2d 500, 502; Adeola, 2001-1231 at p. 7, 822 So.2d at 727; see Daubert, 509 U.S. at 592-93, 113 S.Ct. at 2796. Although Daubert specifically dealt with expert scientific testimony, the United

States Supreme Court determined that the Daubert analysis is equally applicable to all expert testimony. Kumho Tire Company, Ltd., 526 U.S. at 147,119 S.Ct. at 1174.

To ensure reliability, the Daubert standard requires that the expert's opinions be grounded

in methods and procedures of science, rather than just subjective belief or unsupported speculation. Accordingly, before expert testimony is admitted, the court must make a preliminary assessment that the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at issue. Daubert, 509 U.S. at 589-93, 113 S.Ct. at 2795-96; Devall, 2007-0156 at pp. 3-4,979 So.2d at 502.

In determining whether expert testimony is reliable, the Court in Daubert enumerated illustrative considerations to determine whether the reasoning and methodology underlying the testimony is scientifically valid and can properly be applied to the facts at issue, as follows: (1) whether the expert's theory or technique can be and has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) whether there is a known or potential rate of error, and (4) whether the methodology is generally accepted in the scientific community. Daubert, 509 U.S. at 593-94, 113 S.Ct. at 2796-97; Devall, 2007-0156 at p. 4,979 So.2d at 502-03.

In cases with non-scientific experts, the Daubert analysis can be tailored, and the trial court should consider the Daubert factors that are reasonably applicable and serve as useful measures in judging the reliability of the expert's

opinion. Kumho Tire Company, Ltd., 526 U.S. at 152, 119 S.Ct. at 1176. Whether the expert opinion is based on personal experience and study or on scientific or professional studies, the trial court must ascertain if the witness employed the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Company, Ltd., 526 U.S. at 152,119 S.Ct. at 1176.

The decision to admit or exclude expert testimony is within the sound discretion of the trial court. Its judgment will not be disturbed by an appellate court unless it is clearly erroneous. Devall, 2007-0156 at p. 4, 979 So.2d at 503; LSA-C.E. art. 702, Comments-1988 (d).

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Prior to trial, defendants filed a motion in limine to exclude the testimony of Dr. Davis. Subsequently, defendants also objected to other witnesses to be called by plaintiff as experts, including Mr. Emfinger. By memorandum in support, and at the hearing on the motion, defendants made essentially the same arguments offered on appeal. At the end of the hearing, the trial court denied the motion in limine as to Dr. Davis and Mr. Emfinger, but stated that the court would review the

qualifications at trial on voir dire and revisit the objections at that time.

MAX EMFINGER

When Mr. Emfinger was called as a witness at trial, the jury was excused and the parties conducted a Daubert-style hearing on the issue of Mr. Emfinger's qualifications. In part, Mr. Emfinger testified that he had acted as a scout and had been ranking high school players according to their ability to play college football for several years. He issued opinions through his own business, to which many schools subscribed, and he had offered his opinion on rankings on ESPN and in several sporting magazines. Although he felt qualified to rank the players, he admittedly had never assessed a team as a whole. Plaintiff tendered Mr. Emfinger as an expert in the quality of the college football players and the collective quality of the ULL team that Mr. Baldwin inherited in 1999, the future prospects of success for that team based on the level of the players, and the importance of recruiting. After hearing the questioning and arguments by counsel for both sides, the trial court accepted Mr. Emfinger as an expert in the first category only, that is, assessment of the quality of the players and the collective talent of the team. The jury was then returned to the

courtroom and the voir dire process was repeated for the benefit of the jury. After questioning by both sides, Mr. Emfinger was only tendered and accepted in the first category: the quality of the football players and the collective quality of the ULL team that Mr. Baldwin inherited.

From our extensive review of the hearing on the motion in limine, the voir dire at trial, and the questioning of Mr. Emfinger, on direct and on cross-examination, we cannot say that the trial court abused its discretion in accepting Mr. Emfinger as tendered and denying defendants' objections. The witness had (1) extensive experience in the field of ranking high school players, not only on their past

performance, but also on his opinion of their ability and talent for succeeding in college football; (2) his opinions accepted by those recruiting players for college or reporting on recruitment, and (3) been recognized as an expert by others recognized as experienced in the field. Thus, the trial court had sufficient information before it to accept Mr. Emfinger's testimony as adequately reliable, especially considering the non-scientific character of the field, and as providing some assistance to the

trier of fact. See Devall, 2007-0156 at pp. 2-5,979 So.2d at 502-03; LSA-C.E. art. 702.

Additionally, the defendants, through questioning, were allowed to attack Mr. Emfinger's opinion by highlighting the speculative nature of any ranking system and the inability to scientifically test such rankings until the player had successfully performed on the college field. Although Mr. Emfinger had not previously done a collective assessment, the questioning by defendants, during voir dire in the presence of the jury at trial, and later on cross-examination, exposed the weaknesses in a collective assessment and the unknown effect of variables. While the trial court may have erred in allowing Mr. Emfinger too much latitude in the area of retroactively assessing team performance as a whole, the record does not support a finding that the defendants were unduly prejudiced by Mr. Emfinger's testimony when reviewed in toto. See Devall, 2007-0156 at pp. 4-5, 979 So.2d at 503; Rivere v. Union Pacific Railroad Company, 93-1132, pp. 3-4 (La.App. 1 Cir. 10/7/94), 647 So.2d 1140, 1144, writ denied, 95-0292 (La. 3/24/95), 651 So.2d 295.

DR. WILLIAM DAVIS

Plaintiff requested that Dr. Davis be accepted as an expert in the relationship between an athletic director and a coach; the duties and responsibilities of an athletic director, specifically in a football program; and on the traditional and appropriate manner in which a university terminates a football coach, communicates that news to the coach, and the implications of a particular method of termination. As with Mr. Emfinger, Dr. Davis's specific expertise or qualifications was an issue at the in limine hearing, and he was also subjected to a lengthy initial voir dire, out of the presence of the jury and again before the jury.

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During the trial, plaintiff established that Dr. Davis had an impressive educational background and extensive experience in administration at the college level. While serving as president or chancellor of various colleges, including his tenure as the Chancellor of LSU, he had oversight and ultimate responsibility for the athletic programs, including football, and had worked with the NCAA and the athletic directors at his schools and others. However, he had only served for about one year as an interim

college football coach early in his career and had never served as an athletic director on the college or university level. More importantly, in the specific area at issue on appeal, choice and methods of terminations and their ramifications, Dr. Davis testified that he had directly participated in the termination of only three head football coaches during his long career, and that his opinion in that area was his personal view on the subject and was based on common sense. He had conducted no polls and had not directed investigation, or other research, to determine if his opinion was held by a number or a majority of other administrators or athletic directors; he had not conducted, sought, or seen any follow up studies of coaches who had been fired, or of coaches allowed to resign, to determine how they were actually affected by the different methods of termination; and he had not investigated or researched the consequences of the two types of terminations. He testified that he had never been tendered as an expert before in the field of firings versus resignations, or the consequences of those two types of terminations; had no knowledge of any existing studies or writings on the subject; and had not attempted to find any studies.

After the initial voir dire, Dr. Davis was accepted by the trial court as tendered, including

the question of termination methods and their consequences. After the voir dire in the presence of the jury, Dr. Davis was again accepted as tendered.

The record on appeal substantiates Dr. Davis' extensive experience in academia and in general oversight of various athletic programs. However, the dispute is whether his background was sufficient to qualify him as an expert in the process of firing a football coach and the specific effects on a coach from firing versus resignation. To qualify as an expert under the Daubert-Foret analysis, the witness's opinion in the area in question must be shown to be reliable. The quality of the factual basis for the

opinion determines the reliability. The opinion must have been subjected to study, investigation, or research, whether scientific or personal, sufficient to render it reliable, and must be more than just his own subjective belief or unsupported speculation. Carrier v. City of Amite, 2008-1092, p. 4 (La.App. 1 Cir. 2/13/09), 6 So.3d 893, 897; Devall, 2007-0156 at pp. 3-4, 979 So.2d at 502; Miramon v. Bradley, 96-1872, p. 6 (La.App. 1 Cir. 9/23/97), 701 So.2d 475, 478; see Daubert, 509 U.S. at 590, 113 S.Ct. at 2795 (to

be reliable, the opinion must be supported by "appropriate validation-Ae., `good grounds....'")

In this case, Dr. Davis was a key witness whose testimony was critical to two issues at the heart of the case: whether Mr. Baldwin had been damaged by being fired, instead of being allowed to resign, and whether the firing prevented him from obtaining another coaching position and caused him damage in other ways. His opinion on those highly disputed issues was admittedly his own personal view, without any investigations, or even preliminary surveys or polls, to provide some demonstrable foundation for his conclusions or some indicia of reliability. Devall, 2007-0156 at pp. 3-4, 979 So.2d at 502. Such an unsupported opinion can provide no assistance to the trier of fact. Carrier, 2008-1092 at p. 4, 6 So.2d at 897; Miramon, 96-1872 at p. 6, 701 So.2d at 478.

Unfortunately, the erroneous designation as an expert in the disputed areas placed an unwarranted level of importance on unsubstantiated and admittedly subjective opinions. Where the testimony of a key witness is deemed unreliable, the possibility of prejudice is significantly increased, and the jury's ability to fairly determine the facts is not only negatively impacted, but is interdicted. Franklin v. Franklin, 2005-1814, pp. 7-8 (La.App. 1 Cir.

12/22/05), 928 So.2d 90, 94, writ denied, 2006-0206 (La. 2/17/06), 924 So.2d 1021; Rivere, 93-1132 at p. 4, 647 So.2d at 1144. In such cases, a remand may well be required.3 See Franklin, 2005-1814 at p. 8, 928 So.2d at 94; Adeola, 2001-1231, p. 9, 822 So.2d at 728.

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JURY VERDICT

Defendants assert two e rors based on the jury verdict. First, defendants argue that the jury's answers to the question of racial discrimination were confusing or misleading. Secondly, the trial court erred in failing to recognize the absence of the requisite number of votes for a finding in favor of plaintiff on two of the causes of action.

Louisiana Code of Civil Procedure article 1813 provides as follows:

A. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict,

and the court shall direct the jury both to make written answers and to render a general verdict.

B. The court shall inform the parties within a reasonable time prior to their arguments to the jury of the general verdict form and instructions it intends to submit to the jury, and the parties shall be given a reasonable opportunity to make objections.

C. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers.

D. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial.

E. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers or may order a new trial.

Based on the statutory language, when answers to the interrogatories are inconsistent

with the general verdict, the trial court has three options. The court may grant a JNOV and render judgment in accordance with the specific answers, order a new trial, or return the matter to the jury for further consideration. The choice of options is within the sound discretion of the trial court. However, if the trial court

enters judgment in conformity with the general verdict despite the inconsistency with the answers to the interrogatories, the trial court commits reversible error. Diez, 94-1089 at pp. 3-5, 657 So.2d at 1069.

VERDICT: RACIAL DISCRIMINATION

Under Louisiana law, it is unlawful for an employer to "[i]ntentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin." LSA-R.S. 23:332 A(1). Racial discrimination is also unlawful under federal law pursuant to Title VII of the Civil Rights Act of 1964 and subsequent legislation. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct.

2742, 125 L.Ed.2d 407 (1993); McDonnell Douglas Corporation, 411 U.S. 792, 93 S.Ct. 1817; Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990). Based on the commonality between federal and state anti-discrimination laws, state courts may appropriately consider a federal court's interpretation of federal statutes to resolve similar questions concerning Louisiana statutes and the proper burden of proof sequence. Hicks v. Central Louisiana Electric Company, Inc., 97-1232, p. 3 (La.App. 1 Cir. 5/15/98), 712 So.2d 656, 658.

The plaintiff claiming discrimination has the initial burden of proof and must establish a prima facie case of discrimination. The plaintiff may meet this initial burden by showing that (1) he was a member of a racial minority; (2) he was qualified for the position; (3) he was discharged; and (4) the position was filled by a person who was not a member of the protected minority class. See St. Mary's Honor Center, 509 U.S. at 506, 113 S.Ct. at 2747; McDonnell Douglas Corporation, 411 U.S. at 802, 93 S.Ct. at 1824; Vaughn, 918 F.2d at 521. If the plaintiff establishes a prima facie case, the burden shifts to the defendant who "must articulate a legitimate nondiscriminatory reason for its action. If the defendant articulates such a reason, the plaintiff must then show by a

preponderance of the evidence that the defendant's reason is mere pretext." Vaughn, 918 F.2d at 521; see McDonnell Douglas Corporation, 411 U.S. at 802-04, 93 S.Ct. at 1824-26. However, despite the shifting

burdens, the ultimate burden remains with the plaintiff to show that the true reason for the adverse employment action was the impermissible discriminatory factor. St. Mary's Honor Center, 509 U.S. at 506-08, 113 S.Ct. at 2747-48.

In contrast to the pure pretext burden of proof requirements, federal jurisprudence interpreting federal statutes has developed a somewhat different analysis for cases where a plaintiff has shown that improper discrimination was one of the motivating factors for the negative employment action, in conjunction with other legitimate factors or motives for the defendant's action. In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 LEd.2d 268 (1989), the United States Supreme Court found that use of the phrase "because of" in the federal statute did not exclusively refer to cases where the discrimination at issue was the only reason for the adverse employment action.

Rather, the choice of words also contemplated consideration and review of all of the reasons, both legitimate and illegitimate, contributing to the employment decision. See Price Waterhouse, 490 U.S. at 239-241, 109 S.Ct. at 1785. The Court then outlined the appropriate sequence and burdens to be used in "mixed motive" cases, as distinguished from pure "pretext" cases. The Court held that after plaintiff has met his burden in a mixed motive case to show that discrimination actually "played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [discriminatory factor] into account." Price Waterhouse, 490 U.S. at 258, 109 S.Ct. at 1795; see Mbarika v. Board of Supervisors of Louisiana State University, 2007-1136, p. 17 (La.App. 1 Cir. 6/6/08), 992 So.2d 551, 562, writ denied, 2008-1490 (La. 10/3/08), 992 So.2d 1019. Thus, although proof that discrimination was one of the motivating factors shifts the burden, it does not automatically resolve the case in plaintiff's favor. Only if the defendant is unable to meet its burden to show that the employment action would have been taken regardless of race, can the plaintiff be successful.

In 1991, two years after Price Waterhouse, Congress amended the federal Civil Rights Acts of 1866 and 1964 to provide that an illegal discriminatory action is

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established when "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). If a party proves a violation under the specific change in the wording of section 2000e-2(m), a limited affirmative defense is available if the employer can show that it "would have taken the same action in the absence of the impermissible motivating factor. . . ." 42 U.S.C. § 2000e-5(g)(2)(B). Although the defense does not excuse liability, it reduces the available remedies and excludes the remedy of damages. 42 U.S.C. § 2000e-5(g)(2)(B)(i-ii). Louisiana, however, chose not to amend its statute to include the 1991 federal changes and maintained only the broader "because of" language.

In Louisiana, this court has traditionally employed the McDonnell Douglas type analysis for pretext cases, and, in mixed motive cases, acknowledged use of a Price Waterhouse type

analysis. See Mbarika, 2007-1136 at p. 17, 992 So.2d at 562. However, after a case has been fully tried, the burden-shifting analysis ceases to be of singular or paramount importance to the appellate court. Instead, the inquiry becomes whether the record contains sufficient evidence to support the conclusions reached by the jury or factfinder. Seagrave v. Dean, 2003-2272, p. 7 (La.App. 1 Cir. 6/10/05), 908 So.2d 41, 45, writ denied, 2005-2349 (La. 3/17/06), 925 So.2d 543, and cert. denied, 549 U.S. 822, 127 S.Ct. 157, 166 L.Ed.2d 38 (2006).

In its jury instructions on the claim of racial discrimination, the trial court cited the language from LSA-R.S. 23:332, and stated that: "If you disbelieve the reasons that the defendants have given for their decision to take any employment action against the plaintiff, you may infer that the defendants took that action because of the plaintiff's race." The court also notified the jury that the plaintiff need not prove that race was the only reason for the termination, but would "have to prove that his race was a motivating factor causing defendants to take an employment action against him." The jury would then have to consider whether the "defendants proved by preponderance of the evidence that they would have made the same decision even if the defendant had not considered the plaintiff's

race." Thus, the court gave instructions for a pretextual case and a mixed motive case.

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The first finding in the verdict form was that Mr. Baldwin had not been terminated "because of" his race. Notwithstanding the use of the exact phrase from the Louisiana statute, especially in light of the statement in Price Waterhouse that both a pretext case and a mixed motive case arise under the "because of" language, the jury verdict form included a second interrogatory. That interrogatory appears to have been directed toward the theory of mixed motives. If that is the case, the jury's finding that race was "a determining factor" is either an incomplete answer, in the absence of a further finding of whether defendants would have proceeded to termination despite race considerations, or, despite the preliminary finding of "a determining factor," the finding that plaintiff was not terminated "because of" race serves as the final negative determination on the discrimination claim.

No matter which assumption is correct, the result is the same; the jury's answers do not support a finding of impermissible racial discrimination. However, based on the

arguments made in the court below on defendants' motion for the JNOV or a new trial and in their briefs to this court, specifically that the finding of racial discrimination should be reversed, all parties seem to exhibit a continued belief that the jury did indeed find in favor of plaintiff on the claim of racial discrimination.4 Apparently, the parties incorrectly interpreted the singular finding that race was "a determining factor" as sufficient alone to establish a discriminatory claim. That may be the case under the amended federal statute, but not under the Louisiana statute and applicable jurisprudence. In addition, by denying defendants' request for a JNOV or a new trial despite their argument that the jury wrongly found racial discrimination, albeit an argument essentially based on the evidence at trial, the trial court appears to have accepted an affirmative finding by the jury on the issue.

In those beliefs, the parties and the trial court incorrectly interpreted the responses on the verdict form. Although the amended federal statute provides that an

illegal discriminatory action is established when "the complaining party demonstrates that race,

color, religion, sex, or national origin was a motivating factor for any employment practice," Louisiana did not adopt the change in language and maintained the more general "because of" language. Certainly, the general language does encompass both types of claims, pretextual and mixed motive, and a party may chose to pursue one claim or make an alternative argument. See generally Mbarika, 2007-1136 at p. 17, 992 So.2d at 562. For mixed motive claims in particular, the shifting burden analysis outlined in Price Waterhouse is an appropriate guide, not the amended federal statute. Using the Price Waterhouse analysis, which was outlined in the trial court's jury instructions, the jury responses to the two questions covering the racial discrimination claim, read separately or together, cannot be read as a finding in favor of plaintiff.

After reviewing the parties' arguments and the trial court's denial of the motion for a JNOV5 and new trial, we conclude that the actual findings of the jury are inconsistent with the judgment and are akin to a judgment based on a general verdict that is inconsistent with the interrogatories. Thus, based on the inconsistency of the verdict and the judgment, the trial court committed reversible error in denying the motion for JNOV or new trial.6 See LSA-C.C.P. art.

1972; Diez, 94-1089 at pp. 4-5, 657 So.2d at 1069; IP Timber lands Operating Company, 93-1637 at pp. 32-34, 657 So.2d at 303-04.

VERDICT: INADEQUATE AFFIRMATIVE VOTES

"If trial is by a jury of twelve, nine of the jurors must concur to render a verdict unless the parties stipulate otherwise." LSA-C.C.P. art. 1797B. The record before us

contains no stipulation rescinding the requirement of nine votes. Thus, nine out of the twelve jurors had to concur to render a verdict in plaintiff's favor.

In this case, polling of the jury demonstrated insufficient support for the affirmative responses shown on the jury verdict form for questions 6 and 8. Four jurors could not confirm the necessary "yes" vote on the elements of the interference with a contract claim. Similarly on question 8, less than nine affirmative votes were counted in the poll for the elements comprising the claim of negligent infliction of emotional distress.

Subsequent to the polling, defendants filed their motion to correct the verdict to conform to

the polling. The trial court, after hearing argument on the motion, found at least nine affirmative votes had been cast in favor of the claims of interference with contract and negligent infliction of emotional distress in plaintiff's favor, and denied the motion.

From our review of the record on this point, the trial court was clearly and legally wrong in finding nine affirmative votes. The entry of a judgment that the court found was in favor of plaintiff on questions 6 and 8 was impermissibly inconsistent with the vote of the jury confirmed by the polling. Thus, pursuant to LSA-C.C.P. arts. 1797 and 1813, the denial of the motion to conform the verdict constituted reversible error. See Diez, 94-1089 at pp. 4-5, 657 So.2d at 1069.

REVIEW OR REMAND

After our thorough review of the record, and applicable legal precepts, we have discovered more than one reversible error, ranging from juror selection to a judgment not reflective of the jury verdict. More importantly, we found more than one structural and material error: the Batson and expert qualification errors. Thus, in this fact intensive case, we find that the fact finding process was tainted and a determination of a preponderance of the evidence cannot fairly

be reached based on a review of this cold record. Under these circumstances, a de novo review would not be meaningful, and a fair, impartial resolution requires a new trial: one in which the multiple credibility determinations of the type particularly dependent on first hand observation, including those from qualified expert witnesses, can be decided by a competent, impartial jury.

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See Adeola, 2001-1231 at p. 9, 822 So.2d at 728; Diez, 94-1089 at pp. 7-10, 657 So.2d at 1070-72; Savin, 579 So.2d at 457-58. Therefore, we must vacate the judgment and remand the case for a new trial.7

CONCLUSION

For these reasons, we vacate the judgment and remand for further proceedings consistent with this opinion. The costs of the appeal are assessed to plaintiff, Jerry Lee Baldwin.

VACATED AND REMANDED.

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Appendix A

VERDICT FORM

I. RACIAL DISCRIMINATION

1. Do you find by a preponderance of the evidence that:

Defendant, Board of Supervisors for the University of Louisiana System terminated Plaintiff, Jerry Baldwin, because of his race?

____ Yes No ____

2. Do you find by a preponderance of the evidence that Coach Baldwin's race was a determining factor in his termination by the Board of Supervisors for the University of Louisiana System?

Yes ___ No

II. BREACH OF CONTRACT

3. Do you find by a preponderance of the evidence that Defendant, Board of Supervisors for the University of Louisiana System, breached its contract with Plaintiff, Jerry Baldwin?

Yes ___ No

III. BAD FAITH BREACH OF CONTRACT

4. If you find by a preponderance of the evidence that Defendant breached its contract with Plaintiff, do you find that any such breach was in bad faith?

[Do not answer this question unless your answer to Question 3 was yes]

____ Yes No ___

IV. ABUSE OF RIGHTS

5. Do you find by a preponderance of the evidence that:

a. Defendant, Board of Supervisors for the University of Louisiana System and Nelson Schexnayder, had a right to terminate Plaintiff, but terminated him solely to harm him or with the predominant motive of harming him?

____ Yes No ___

b. Defendant, Board of Supervisors for the University of Louisiana System and Nelson Schexnayder, had no serious and legitimate interest to be gained by terminating Plaintiff? If you believe that Plaintiff has proved this by a preponderance of the evidence, mark "yes". If you do not believe Plaintiff has proved this mark "no".

Yes ___ No

c. Exercising the right to terminate Plaintiff violated moral rules or elementary fairness, or was in bad faith?

Yes ___ No

d. Defendant, Board of Supervisors for the University of Louisiana System and Nelson Schexnayder, exercised the right to terminate Plaintiff for a different purpose than the purposes allowed under the contract?

Yes ___ No

If your answer to any of Questions 5a through 5d was "Yes", then check "Yes" below. If you answered "No" to all of the above, then check "No" below.

Yes ___ No

V. INTERFERENCE WITH CONTRACT

6. Do you find by a preponderance of the evidence that:

a. Defendant, Nelson Schexnayder, intentionally lead the Board of Supervisors for the University of Louisiana System to breach the contract or to make performance of the contract more burdensome, difficult or impossible?

Yes ___ No

b. Defendant, Nelson Schexnayder, was acting outside the scope of his authority and did not think that his actions were in the best interests of the University? If you believe that Plaintiff has proved this by a preponderance of the evidence, mark "yes". If you do not believe Plaintiff has proved this mark "no". If you do not

believe that Plaintiff proved both parts of this question, mark "no".

Yes ___ No

c. Plaintiff was damaged by breach of the contract or by the fact that performing the contract was more burdensome, difficult or impossible?

Yes ___ No

If your answer to all of Questions 6a through 6c was "Yes", then check "Yes" below. If you answered "No" to any of the above, then check "No" below.

Yes ___ No

VI. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

7. Do you find by a preponderance of the evidence that:

a. The conduct of Defendant, Board of Supervisors for the University of Louisiana

System through its representative Nelson Schexnayder, was extreme and outrageous at any time?

____ Yes No ____

b. Plaintiff suffered severe emotional distress as a result of that conduct?

____ Yes No ___

c. Defendant, Board of Supervisors for the University of Louisiana System desired to inflict severe emotional distress upon Plaintiff, or knew that severe emotional distress would be certain or substantially certain to result from its conduct?

____ Yes No ____

If your answer to all of Questions 7a through 7c was "Yes", then check "Yes" below. If you answered "No" to any of the above, then check "No" below.

____ Yes No ___

Notes:

1. A copy of the actual jury verdict form is attached as Appendix A.

2. Acts 2008, No. 669, § 1, made the changes shown in brackets. The changes do not affect the case before us.

3. It is undisputed that the trial court has the right to control the nature, extent, and character of cross examination; however, the trial court cannot deprive a litigant of the procedural right of cross examination in the interest of judicial economy and other well-intentioned motives. Adeola, 2001-1231 at p. 8, 822 So.2d at 727. Here, based on our ruling on Dr. Davis' qualification as an expert, we need not fully examine the argument that the trial court exceeded its authority in limiting cross-examination to protect the privacy of certain individuals. As for the argument directed to another witness, we first note that a trial court's privacy concerns can be protected in other ways, without necessarily limiting cross examination, but find no undue prejudice. The majority of the information sought by defendants to contradict the disputed opinions was eventually presented through other cross-examination and the testimony of defendants' witnesses.

4. During the hearing on the motion to conform the verdict to the jury poll, defendants primarily argued the lack of nine votes for some of the causes of action, not whether the jury found in favor of the plaintiff on the issue of race. Only in connection with the issue of attorney's fees did defendants argue that, because the Louisiana statute uses the language "because of," and the jury answered that the termination was not "because of" race, fees could not be awarded under the statute. In the motion for JNOV or new trial, the defendants argued that the finding of racial discrimination should be reversed.

5. After considering the arguments made on the motion for JNOV, pursuant to LSA-C.C.P. art. 1811, we note that the grant of a JNOV is not the proper remedy to correct an error in the trial court's own judgment. See Pino v. Gauthier, 633 So.2d 638, 655 (La.App. 1 Cir. 1993), writs denied, 94-0243 (La. 3/18/94), 634 So.2d 858 and 94-0260 (La. 3/18/94), 634 So.2d 859.

6. Although we decide this assignment of error primarily based on the inconsistency between the judgment and the jury interrogatories, we also noted and considered plaintiff's statement that any confusion in the jury interrogatories could have been objected to and corrected at the time, that is, before the jury was dismissed. However, in this case, to the extent that the

interrogatory on "a determining factor" is found to be incomplete or misleading, the error is a patent and fundamental one that misstates the law. Thus, the legal error, especially in light of the motion to conform the verdict to the jury poll, is before the court. See Berg v. Zummo, 2000-1699, p. 13 n.5 (La. 4/25/01), 786 So.2d 708, 716-717 n.5.

7. Having found errors necessitating a remand, we pretermit defendants' other assignments of error.

The Supreme Court of the
State of Louisiana

JERRY LEE BALDWIN

No.2009-C-1919

vs.

THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUSIANA SYSTEM, THE UNIVERSITY OF LOUISIANA AT LAFAYETTE, NELSON SCHEXNAYDER, IN HIS CAPACITY AS DIRECTOR OF ATHLETICS FOR THE UNIVERSITY OF LOUISIANA AT LAFAYETTE

- - - -

IN RE: Baldwin, Jerry Lee; - Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District court Div. B, No. 509,900; to the Court of Appeal, First Circuit, No. 2008 CA 2359;

- - - -

December 18, 2009

Denied.

JPV
CDK
BJJ
JTK
JLW
GGG
MRC

Supreme Court of Louisiana
December 18, 2009

s/Rachel Edelman
Deputy Clerk of Court
for the Court

961 So.2d 418

Jerry Lee BALDWIN

v.

The BOARD OF SUPERVISORS FOR The UNIVERSITY OF LOUISIANA SYSTEM, The University of Louisiana at Lafayette, and Nelson Schexnayder, Individually, and in His Capacity as Director of Athletics for the University of Louisiana at Lafayette.

No. 2006 CA 0961.

Court of Appeal of Louisiana, First Circuit.

May 4, 2007.

[961 So.2d 419]

G. Karl Bernard, Baton Rouge, Marshall Simien, Lake Charles, Counsel for Plaintiff/Appellant Jerry Lee Baldwin.

Robin L. Jones, Lafayette, Counsel for Defendants/Appellees The Board of Supervisors for the University of Louisiana System, The University of Louisiana at Lafayette, and Nelson Schexnayder, Individually, and in his capacity as Director of Athletics for the University of Louisiana at Lafayette.

Before: PARRO, GUIDRY, and McCLENDON, JJ.

McCLENDON, J.

Plaintiff, Jerry Lee Baldwin, appeals the trial court's grant of a partial summary judgment dismissing the racial discrimination [961 So.2d 420] claim filed against defendants, the Board of Supervisors for the University of Louisiana System, on behalf of the University of Louisiana at Lafayette, and Nelson Schexnayder, individually, and in his capacity as Director of Athletics for the University of Louisiana at Lafayette. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In December of 1998, Mr. Baldwin was employed as the head football coach for the University of Louisiana at Lafayette (ULL). His formal contract was approved by the Board of Supervisors for the University of Louisiana System in April of 1999. On November 26, 2001, after three football seasons, Mr. Baldwin was relieved of his duties as head coach. However, the school continued to pay his salary throughout the remaining term of his contract.

On July 21, 2003, Mr. Baldwin filed a suit alleging various causes of action. By an amending and supplemental petition filed on

September 17, 2004, Mr. Baldwin specifically alleged racial discrimination.

On March 21, 2005, defendants filed a motion for summary judgment asking that plaintiff's claims be dismissed. On the discrimination claim, the trial court, in its oral reasons, found "some issues or claims that are disputed, but I'm of the opinion . . . that the system of the administration at the university separated its employment relationship with Mr. Baldwin for reasons that are not illegal or unlawful." A partial judgment dismissing the racial discrimination claim with prejudice was signed on November 21, 2005.1 Pursuant to LSA-C.C.P. art. 1915 B, Mr. Baldwin filed a motion to certify the partial summary judgment as a final judgment based on the separability of the discrimination claim from the unadjudicated claims; the unlikelihood of the need to review the same issues twice, even with subsequent appeals of judgments on the other causes of action; the interest of sound judicial administration and economy; and, the absence of a just reason for delay. By an order signed on February 24, 2006, the trial court granted the motion to certify without reasons.

On appeal, Mr. Baldwin asserts that the trial court erred in failing to find that the reasons offered by ULL for Mr. Baldwin's removal were a pretext for discrimination. Defendants assert that ULL's reasons for removing Mr. Baldwin were valid and were not based on racial discrimination.

ARTICLE 1915 B CERTIFICATION

A partial judgment or partial summary judgment does not constitute a final appealable judgment. LSA-C.C.P. art. 1915 B(1). However, the judgment may be certified as a final judgment "after an express determination that there is no just reason for delay." Id.

Initially, we note that, although the trial court granted the motion to certify the partial summary judgment as a final judgment subject to appeal, the trial court did not provide its own analysis or reasons for the certification. Thus, under the principles enunciated in R.J. Messinger, Inc. v. Rosenblum, 2004-1664, pp. 13-14 (La.3/2/05), 894 So.2d 1113, 1122-23, we must review the propriety of the certification, on which our jurisdiction to hear the appeal is based, before we address the merits of the appeal. [961 So.2d 421]

The jurisprudence has long maintained a policy against multiple appeals that foster piecemeal litigation. However, of equal importance is the need to balance judicial efficiency and economy with the need for review at a time that best serves the interests of the litigants. R.J. Messinger, Inc., 2004-1664 at p. 13, 894 So.2d at 1122. Noting that LSA-C.C.P. art. 1915 B was patterned after Federal Rule of Procedure 54(b), the Louisiana Supreme Court considered the analysis utilized by federal courts in addressing the lack of reasons for certification, and adopted from the federal jurisprudence the following non-exclusive factors to consider in deciding whether a partial judgment should be certified:

1. The relationship between the adjudicated and unadjudicated claims;

2. The possibility that the need for review might be mooted by future developments in the trial court;

3. The possibility that the reviewing court might be obliged to consider the same issue a second time; and

4. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of

competing claims, expense, and similar concerns. R.J. Messinger, Inc., 2004-1664 at pp. 13-14, 894 So.2d at 1122.

After a review of the record in light of the Messinger factors, and balancing the need for judicial administration with the need for fairness to the parties, we find that the partial summary judgment was properly certified. The claim that Mr. Baldwin was fired because he was an African-American is a separate cause of action from the unadjudicated claims based on contract. Further, it is unlikely that the need for review of the racial discrimination claim will be mooted by future developments in the district court on the causes arising in contract. While some of the facts in the discrimination claim may overlap with other tort claims alleged in the petition, such as the intentional infliction of emotional distress, that factor alone is not sufficient to preclude or void a certification. See H & W Industries, Inc. v. Formosa Plastics Corp., 860 F.2d 172, 175 (5th Cir.1988). From what is present in the record before us, a judgment on the discrimination claim would neither resolve nor impede the remaining intentional tort claims. Nor would it force an unnecessary second review of this essentially separate cause based on racial discrimination. A ruling on the

discrimination claim appears to pose no threat to the viability of the remaining causes of action. However, a delayed reversal of the summary judgment dismissing the racial discrimination claim, that is, a reversal rendered after final judgment on the other claims brought by plaintiff, would require the parties to pursue the discrimination claim in another, separately held trial. If the summary judgment dismissing the discrimination claim is reviewed now, and reversed, it may be possible to try the discrimination claim with one or more of the other claims still pending in the court below, which could avoid unnecessary duplication of trial costs. This would benefit the judicial system and the parties. Thus, from our review, we cannot say that judicial efficiency and economy would be adversely affected by reviewing the judgment dismissing the claim of racial discrimination at this time. It appears far more likely that considerations of efficiency, economy, and fairness favor a review now, rather than later. See Custom-Bilt Cabinet & Supply, Inc. v. Quality Built Cabinets, Inc., 32,441, pp. 15-17 (La.App. 2 Cir. 12/8/99), 748 So.2d 594, 605.

RACIAL DISCRIMINATION CLAIM APPLICABLE LEGAL PRECEPTS

Under Louisiana law, it is unlawful for an employer to "[i]ntentionally fail or

[961 So.2d 422]

refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin." LSA-R.S. 23:332 A(1). Racial discrimination is also unlawful under federal law pursuant to Title VII of the Civil Rights Act of 1964 and subsequent legislation. See McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); Vaughn v. Edel, 918 F.2d 517 (5th Cir.1990). Based on the commonality between federal and state anti-discrimination laws, state courts may appropriately consider a federal court's interpretation of federal statutes to resolve similar questions concerning Louisiana statutes and the proper burden of proof sequence. Hicks v. Central Louisiana Electric

Company, Inc., 97-1232, p. 3 (La.App. 1 Cir. 5/15/98), 712 So.2d 656, 658.

The plaintiff claiming discrimination has the initial burden of proof and must establish a prima facie case of discrimination. The plaintiff may meet this initial burden by showing that (1) he was a member of a racial minority; (2) he was qualified for the position; (3) he was discharged; and (4) the position was filled by a person who was not a member of the protected minority class. See McDonnell Douglas Corporation, 411 U.S. at 802, 93 S.Ct. at 1824; St. Mary's Honor Center, 509 U.S. at 506, 113 S.Ct. at 2747; Vaughn, 918 F.2d at 521. If the plaintiff establishes a prima facie case, the burden shifts to the defendant who "must articulate a legitimate nondiscriminatory reason for its action. If the defendant articulates such a reason, the plaintiff must then show by a preponderance of the evidence that the defendant's reason is mere pretext." Vaughn, 918 F.2d at 521; see McDonnell Douglas Corporation, 411 U.S. at 802-04, 93 S.Ct. at 1824-25.

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. Fagan v. LeBlanc, 2004-2743, p. 5 (La.App. 1 Cir. 2/10/06), 928 So.2d 571, 574. Summary

judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B.

A motion for summary judgment is rarely appropriate for a determination based on subjective facts, such as intent, motive, malice, knowledge, or good faith. Bilbo v. Shelter Insurance Company, 96-1476, p. 5 (La.App. 1 Cir. 7/30/97), 698 So.2d 691, 694, writ denied, 97-2198 (La.11/21/97), 703 So.2d 1312; Sanders v. Ashland Oil, Inc., 96-1751, pp. 6-7 (La. App. 1 Cir. 6/20/97), 696 So.2d 1031, 1035. Further, issues that require the determination of reasonableness of acts and conduct of parties under all facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. Granda v. State Farm Mutual Insurance Company, 2004-1722, pp. 4-5 (La.App. 1 Cir. 2/10/06), 935 So.2d 703, 707, writ denied, 2006-0589 (La.5/5/06), 927 So.2d 326.

On appeal, summary judgments are reviewed de novo under the same criteria that govern the trial court's consideration of whether

summary judgment is appropriate. Sunrise Construction and Development Corporation v. Coast Waterworks, Inc., 00-0303, p. 4 (La.App. 1 Cir.6/22/01), 806 So.2d 1, 3, writ denied, 01-2577 (La.1/11/02), 807 So.2d 235.

[961 So.2d 423]

APPLICATION OF LAW TO THE FACTS

On the motion for summary judgment, Mr. Baldwin presented what he considered to be a prima facie case of racial discrimination. He offered evidence to show that he was an African-American, his background as a high school football coach and assistant coach at LSU qualified him for the position of head coach at ULL, he was removed from his duties, and he was replaced by a white male.

To counter Mr. Baldwin's evidentiary showing, ULL offered what it considered legitimate and nondiscriminatory reasons for the removal. ULL pointed to the three losing seasons comprising Mr. Baldwin's tenure and the significant drop in game attendance, particularly in light of a pending NCAA rule that required a higher level of attendance for ULL to maintain its Division 1-A status. ULL also argued that the

win/loss record and the low attendance combined to create a budget crisis that demanded an immediate change in the head football coaching position.

In response, Mr. Baldwin argued that the reasons offered by ULL were not the true reasons and were merely pretextual. As support, Mr. Baldwin highlighted evidence that he believed undermined ULL's claim of nondiscriminatory reasons.

To rebut ULL's reliance on the win/loss record as a nondiscriminatory basis for removal, Mr. Baldwin highlighted testimony from ULL's personnel showing that ULL was aware that the "cupboard was bare," that is, the ULL team was extremely weak in terms of depth and talent at the time Mr. Baldwin was hired, and that ULL realized it would take some time to turn the program around. In addition, although the replacement coach had two losing seasons, he was actually given a contract extension.

On the question of game attendance, Mr. Baldwin established that the attendance in his first year as head coach greatly improved over the previous year's numbers, and asserted that the program benefited from the help of ULL's

marketing director. Mr. Baldwin argued that the subsequent drop in attendance was in part caused by the absence of a marketing director in Mr. Baldwin's second and third seasons. In contrast, after the replacement coach was hired, the vacancy in the marketing director position was filled, and an additional person was hired to assist as a fundraiser.

As for the budget crisis, Mr. Baldwin produced testimonial evidence showing that it was of long standing and argued that it was not primarily caused by the three losing seasons or the lowered attendance. Mr. Baldwin produced deposition testimony from ULL's president that ULL's scheduling of "money games," defined as games with better known and higher caliber teams, brought in more money than an average game. More so than team records or attendance, these "money games" were relied on by the administration to bolster the shortfalls in the budget. Thus, Mr. Baldwin argued, the budget crisis during his term was exacerbated by ULL's decision not to schedule sufficient "money games," its failure to replace the marketing director, and ULL's failure to support Mr. Baldwin's quest for a coach's television show, which he believed would create more local interest in ULL football.

Mr. Baldwin also relied on a claim that he was treated differently than the prior coach and the replacement coach. For example, although the previous coach was counseled when the administration disapproved of the football program or decisions by that coach, ULL never apprised Mr. Baldwin of dissatisfaction with his performance

[961 So.2d 424]

or gave him the opportunity to improve before he was removed. After the new coach was hired to replace Mr. Baldwin, a marketing director and fundraiser were hired, and the new coach was given a television program. Mr. Baldwin also testified that he repeatedly reported a damaged trophy case as an eyesore that negatively reflected on the program during recruiting season. However, repair of the trophy case was not completed until after the new coach was hired. Mr. Baldwin interpreted ULL's decisions as calculated to undermine his success, which he believed was used as a basis for his removal, when the true basis was racial discrimination.

ULL argued that Mr. Baldwin's interpretation of the facts, and the motives

assigned by Mr. Baldwin to ULL's actions, were erroneous. ULL asserted that the television show was a decision made by the local station based on advertising, and that any delay in the repair of the trophy case arose from the school's lack of funds and some missteps by a volunteer involved in the repair. According to ULL, the same lack of funds caused the delay in the hiring of another marketing director. Overall, ULL believed its conduct was reasonable and stated that its decisions and actions were not based on racial discrimination.

From our review, we agree that the plaintiff met his initial burden to establish a prima facie case, and that the defendants came forth with seemingly legitimate and nondiscriminatory reasons for Mr. Baldwin's removal. At that point, Mr. Baldwin was required to show that genuine issues of material fact remained as to whether the reasons offered by ULL for the removal were a pretext for racial discrimination.

Based on the record evidence before us, we find that Mr. Baldwin successfully met his burden. The facts asserted by both Mr. Baldwin and ULL are open to different interpretations. For example, different motives can be attributed to the decision not to hire another marketing

director during Mr. Baldwin's tenure as head coach, allegedly for financial reasons, and the hiring of a marketing director and fundraiser shortly after Mr. Baldwin was removed. The decision could be seen as an indirect method of weakening Mr. Baldwin's attempts to improve support for the team, or may have been a totally financial decision. Similarly, the testimony on the number of variables used by the school in grading the team's performance other than the win/loss record, and the reliance on "money games" as well as the sale of game tickets to improve the budget, could cast doubt on the legitimacy of two of the bases given by ULL for Mr. Baldwin's removal. On the other hand, after the trial court makes various credibility determinations, ULL's decision to remove Mr. Baldwin from his duties as head coach may be found to have a legitimate, non-discriminatory basis. Also, even though a former coach was alerted to the school's concerns and given an opportunity to improve, the failure to alert Mr. Baldwin to ULL's dissatisfaction with the football program's progress may have no basis in discrimination. However, if the disparate treatment was a decision based on discrimination, it is unlawful. See generally Vaughn, 918 F.2d at 521-23. In summary, these inquiries, which require credibility decisions and

determinations of reasonableness of conduct, and motive and intent, are not ripe for summary judgment. See generally Bilbo, 96-1476 at pp. 10-14, 698 So.2d at 697-99.

Therefore, finding that genuine issues of material fact remain, we reverse the partial summary judgment and remand for further proceedings consistent with this opinion. Costs of the appeal are assessed

[961 So.2d 425]

to defendant-appellees, the Board of Supervisors for the University of Louisiana System, on behalf of the University of Louisiana at Lafayette, and Nelson Schexnayder, individually, and in his capacity as Director of Athletics for the University of Louisiana at Lafayette.

REVERSED AND REMANDED.

Notes:

1. Subsequently, the trial court denied defendants' motion for summary judgment on the claims of intentional or negligent infliction of emotional distress, tortious interference with

contract, and breach of contract. The ruling on the claim of abuse of rights is unclear.

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 2008-CA-2359

19th Judicial District Court
Case #: 509900
East Baton Rouge Parish

Jerry Lee Baldwin

-- versus --

Board of Supervisors for the University Of Louisiana System, The University of Louisiana at Lafayette and Nelson Schexnayder, Individually and in His Capacity as Director of Athletics for the University of Louisiana at Lafayette

On Application for Rehearing filed 07/14/2009

Rehearing Denied

s/ Randolph H. Parro
Randolph H. Parro

s/ Page McClendon
Page McClendon

s/ Jewel "Duke" Welch
Jewel "Duke" Welch

Filed Jul 27 2009

s/ Christine L. Crow
Christine L. Crow, Clerk

U.S. CODE

TITLE 42 CHAPTER 21 SUBCHAPTER VI

§ 2000e–2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate

against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or

employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-

management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any

statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for

any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any

race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)

(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)

(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with

respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802 (6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)

(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an

employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had

previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

Louisiana's Employment Discrimination Law

LRS 23:332 Intentional Discrimination in Employment

A. It shall be unlawful discrimination in employment for an employer to engage in any of the following practices:

(1) Intentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin.

(2) Intentionally limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex, or national origin.

B. It shall be unlawful discrimination in employment for an employment agency to intentionally fail or refuse to refer for employment, or otherwise to intentionally discriminate against, any individual because of his race, color, religion, sex, or national origin, or to intentionally classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

C. It shall be unlawful discrimination in employment for a labor organization to engage in any of the following practices:

(1) Intentionally exclude or intentionally expel from its membership, or otherwise intentionally discriminate against, any individual because of his race, color, religion, sex, or national origin.

(2) Intentionally limit, segregate, or classify its membership or applicants for membership, or intentionally classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

(3) Intentionally cause or attempt to cause an employer to discriminate against an individual in violation of this Section.

D. It shall be unlawful discrimination in employment for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any

individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

E. It shall be unlawful discrimination in employment for an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by an employer or membership in or any classification or referral for employment by a labor organization, or relating to any classification or referral for employment by an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by a joint labor-management committee, indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin. However, a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

F. It shall be unlawful discrimination in employment for an insurer to engage in any of the following practices:

(1) Intentionally fail or refuse to appoint or to discharge any insurance agent, or otherwise to intentionally discriminate against any insurance agent with respect to his compensation, terms, conditions, or privileges of employment, because of the insurance agent's race, color, religion, sex, or national origin.

(2) Intentionally limit, segregate, or classify his insurance agents or applicants for an insurance agent in any way which would deprive or tend to deprive any insurance agent or applicant of employment opportunities, or otherwise adversely affect his status as an insurance agent or applicant because of the insurance agent's or applicant's race, color, religion, sex, or national origin.

G. Nothing contained in this Section shall be construed so as to create a cause of action against an employer, employment agency, labor organization, or insurer for employment practices pursuant to any affirmative action plan.

H. Notwithstanding any other provision of this Section, it shall not be unlawful discrimination in employment for:

(1) An employer to hire and employ employees, for an employment agency to classify or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary for the normal operation of that particular business or enterprise.

(2) A school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, or other educational institution or institution of

learning is directed toward the propagation of a particular religion.

(3) An employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production, or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

(4) An employer to give and to act upon the results of any professionally developed ability test, provided that such test, its administration, or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

Acts 1997, No. 1409, §1, eff. Aug. 1, 1997.

(2)

No. 09-1151

Supreme Court, U.S.
FILED
APR 22 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JERRY L. BALDWIN,

Petitioner,

versus

THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The First Circuit Court Of Appeal For The State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

After compiling a win-loss record of 6-27 over three years, Jerry Baldwin was relieved of his duties as head football coach at the University of Louisiana at Lafayette ("ULL") and paid for the remaining year of his contract. He sued ULL's board of supervisors and its athletic director, Nelson Schexnayder, under the theory that Schexnayder and longtime ULL President Ray Authement, acting out of racial animus, hired him as ULL's first black head football coach only to set him up to fail and destroy his career.

A jury unanimously found that Baldwin was *not* fired "because of" his race, but by a vote of nine to three, the jury found that his race was a "determining factor" in the firing.[1] The jury also found for Baldwin on a few of his other claims, including breach of contract, and awarded him more than $2 million.

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[1] The specific interrogatories regarding the discrimination claim were as follows:

1. Do you find by a preponderance of the evidence that

   Defendant, Board of Supervisors for the University of Louisiana System terminated Plaintiff, Jerry Baldwin, because of his race?

   _____Yes _____No

2. Do you find by a preponderance of the evidence that Coach Baldwin's race was a determining factor in his termination by the Board of Supervisors for the University of Louisiana System?

   _____Yes _____No

ULL and Schexnayder asked the Louisiana First Circuit Court of Appeal to decide the case on the merits and render judgment in their favor, on the grounds that Baldwin failed to produce any evidence supporting his claims other than his counsel's speculation that his gripes over his working conditions could somehow be explained by racial animus. Despite the record being complete, the court of appeal declined to rule on the merits. Instead, the court threw out the verdict and remanded the case to the trial court for a new trial, on several grounds:

1. the trial court improperly sustained a *Batson* challenge and seated a juror who admitted during *voir dire* that she believed herself to be, like Baldwin, the victim of unresolved race-based employment discrimination at the hands of her State employer;

2. the trial court improperly allowed former LSU chancellor Bud Davis to testify as an expert that Baldwin should have been given the option of resigning instead of being fired (despite the contract's language enabling ULL to fire him at any time) and that the firing damaged his future prospects, even though Davis admitted that his views on these critical issues were just his personal opinions that were unsupported by any testing or other foundation;

3. the trial court improperly issued a judgment for Baldwin on the discrimination

claim even though the jury's confusing verdict could only be construed as either a negative finding on that claim or an incomplete verdict; and

4. the trial court improperly issued a judgment on two of Baldwin's claims (intentional interference with contract and negligent infliction of emotional distress) despite jury polling showing that Baldwin did not receive the requisite nine votes on either of these claims.

Of these four reversible errors found by the state court, Baldwin addresses only the third in his application to this Honorable Court. Specifically, he argues that under Title VII, the jury's "Yes" vote on the "determining factor" question is sufficient to constitute a finding for him on the discrimination claim, and that the reason the appellate court found to the contrary is that it applied Louisiana's anti-discrimination statute instead of Title VII. According to Baldwin, Louisiana's statute is outdated because it doesn't reflect 1991 amendments to Title VII that make a "yes" vote on a "mixed-motives" question a sufficient basis for a judgment of discrimination.

As demonstrated below, Baldwin fails to offer a proper basis for granting his writ. There is no real issue as to whether state law or Title VII applies, because Louisiana law does not differ in any relevant way from Title VII with respect to mixed-motives claims. Second, any error in the court of appeal's mixed-motives analysis is harmless because even if

the jury's "yes" answer to the "determining factor" interrogatory were, in itself, a "complete" verdict on the discrimination claim, that verdict hopelessly conflicts with the jury's unanimous finding that Baldwin was *not* fired because of race.

ARGUMENT

1. There is no preemption issue because Louisiana's antidiscrimination statute does not differ from Title VII in any relevant way concerning "mixed-motives" discrimination claims.

Baldwin attempts to frame the question before this Court as whether Louisiana's antidiscrimination statute is preempted by Title VII to the extent that Louisiana's statute conflicts with Title VII and imposes an obstacle to Title VII's purposes regarding "mixed-motives" discrimination claims. This question, however, is based on the flawed assumption that there are significant differences between Louisiana's statute and Title VII regarding how mixed-motives claims are analyzed. There are no differences in those statutes that matter to this case.

The prohibitory language in Louisiana's statute is practically identical to that in its federal counterpart. *Compare* LA. REV. STAT. ANN. § 23:332(A)(1) (West 2009) (making it unlawful to "[i]ntentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any

individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin") *with* 42 U.S.C.A. § 2000e-2(a)(1) (Bender 2010) (making it unlawful to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"). This language has been interpreted by both federal courts and Louisiana state courts as barring employment practices where the protected characteristic is a "motivating factor," even though other factors motivated the practice. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 109 S. Ct. 1775, 1795, 104 L. Ed. 2d 268 (1989); *Morgan v. New Orleans Pub. Facility Mgmt.*, 97-0211, p. 3 (La. App. 4 Cir. 11/26/97); 703 So.2d 182, 184 (applying the *Price Waterhouse* "mixed-motives" analysis to Louisiana law).

The jurisprudentially recognized theory of "mixed motives" was later expressly encoded in Title VII with the Civil Rights Act of 1991. *See* 42 U.S.C.A. § 2000e-2(m) (Bender 2010) ("Except as otherwise provided in this title . . . an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.") Because mixed-motives claims were *already* recognized by the jurisprudence, the enactment of § 2000e-2(m)

merely made explicit what was already implicit in the law.

For this reason, no particular significance can be attached to the fact that Louisiana did not amend its statute to include express mixed-motives language. Louisiana law still implicitly recognizes mixed-motives claims, while federal law explicitly recognizes them. Louisiana law thus remains in sync with federal law.

The Civil Rights Acts of 1991 did change the federal law of mixed motives in one respect that is not relevant to this case. Specifically, federal law now provides a limited affirmative defense for the employer: if the employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor," the plaintiff *cannot* be awarded any damages (though declaratory relief, limited injunctive relief, and attorney's fees can be awarded). *Id.* § 2000e-5(g)(2)(B). Again, however, a similar affirmative defense was *already* recognized in *Price Waterhouse*, where six justices of this Court found that an employer could avoid liability by proving, by a preponderance of evidence, that it would have made the same decision absent consideration of the illegitimate factor. *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259-61 (White, J., concurring); *id.* at 279 (O'Connor, J., concurring).[2]

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[2] While the six justices agreed that a showing of an unlawful motive caused the burden to shift to the employer to prove that it would have made the same decision absent

(Continued on following page)

Thus, the *only* change to the law of mixed motives that was effected in 1991 is that an employer who proves that it would have taken the same action in the absence of the impermissible motivating factor, though still absolved of having to pay damages, can now be liable for declaratory relief, some injunctive relief, and attorney's fees. Of these remedies, none are relevant to Baldwin's writ application, because he does not seek declaratory or injunctive relief, and the Louisiana courts have not awarded him any attorney's fees.

Baldwin erroneously suggests that the law of mixed motives was further changed by interpretations of the 1991 amendments to Title VII, particularly by this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). But *Desert Palace* did not change the law of mixed motives; rather, it merely clarified the plaintiff's evidentiary burden in a mixed-motives case. The source of the confusion was Justice O'Connor's

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consideration of the impermissible factor, there was some disagreement as to the nature of the showing required by the plaintiff. The plurality of four justices imposed no limitations on the type of proof and simply required a showing that race was an impermissible motivating factor *Price Waterhouse*, 490 U.S at 251-52 (plurality opinion). Justice White would have required that the plaintiff show that the unlawful motive was a "substantial factor" in the employer's decision. *Id.* at 259 (White, J., concurring). Justice O'Connor believed that a plaintiff should be required to show by direct evidence that the unlawful motive was a substantial factor in the decision. *Id.* at 276 (O'Connor, J., concurring). All agreed on the basic burden-shifting framework.

concurring opinion in *Price Waterhouse*, where she opined that a mixed-motives plaintiff must produce "direct" evidence of discrimination before shifting the burden to the employer to show that it would have made the same decision absent the illegitimate factor. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). Some appellate courts agreed with Justice O'Connor, while other courts, following the plurality in *Price Waterhouse*, imposed no "limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." *Id.* at 251-52. The split was resolved in *Desert Palace* when this Court held that a mixed-motives plaintiff need not produce direct evidence of discrimination to be entitled to a "mixed-motives" jury instruction. *Desert Palace*, 539 U.S. at 95, 101-02. *Desert Palace* simply *agrees with* the plurality in *Price Waterhouse* on this point. It does not change the law.

Because neither the Civil Rights Act of 1991 nor the subsequent interpretative jurisprudence represents a significant departure from the pre-1991 law of mixed motives as articulated in *Price Waterhouse*, Baldwin could not have been prejudiced by the state court of appeal's determination that the Louisiana law of mixed motives is governed by *Price Waterhouse*. Since there is no relevant difference between the holding of *Price Waterhouse* and the current federal law of mixed motives, there is no conflict between the standard applied by the court of appeal and current federal law, and thus no reason for this Court to determine whether Louisiana's supposedly

outdated mixed-motives law has been preempted by Title VII. Without a conflict, there is no need for a preemption analysis.

Baldwin complains that the state court of appeal relied on "the shifting burden analysis outlined in *Price Waterhouse*" rather than the amended federal statute. (Pet. Writ Cert. at 14-15.) His unstated assumption is that the burden-shifting analysis has changed. And in fairness, the court of appeal does seem to agree the burden-shifting framework has changed: it found that while the jury's "yes" answer to the "motivating factor" interrogatory "may" constitute a mixed-motives verdict under current federal law, such a finding would be an "incomplete" verdict under Louisiana law, because Louisiana law, following *Price Waterhouse*, also requires an additional finding that the employer would have made the same decision absent the impermissible motivating factor. (Ct. App. J. at 20.)

This reasoning – and the assumption that Baldwin derives from it – is faulty, because the burden-shifting framework described in *Price Waterhouse* has never been abrogated, either legislatively or jurisprudentially. Under *Price Waterhouse*, if a plaintiff offered proof that a protected characteristic was a motivating factor in an employment decision, the burden shifted to the employer to prove that it would have made the same decision absent the impermissible motivation. *Price Waterhouse*, 490 U.S. at 250. This is still true under current federal law. 42 U.S.C. § 2000e-5(g)(2)(B). While this affirmative

defense under current federal law is a bit more limited in the sense that it sharply limits the remedies available rather than completely bars the claim, nothing in the 1991 amendments or the subsequent jurisprudence of this Court modifies the overall burden-shifting framework or any related requirements for jury interrogatories that map that framework.

Given that the relevant law has not changed, the result should be the same regardless of whether the verdict form is analyzed under the *Price Waterhouse* standard or under current Title VII. If it was error for the court of appeal to find that the jury's "yes" answer to the "determining factor" interrogatory was not, considered in isolation, a "complete" verdict, the error was a simple misapplication of the law – not a result of the court's applying the "wrong" law. Regardless of whether Louisiana law looks to pre-1991 jurisprudence, it does not conflict with current federal law. Absent a conflict, this Court has no reason to consider whether the federal law of mixed motives preempts Louisiana law.

2. The state Court of Appeal's ultimate finding that the jury's answers do not support a verdict of discrimination is correct because the jury's 9-3 finding that race was a "determining factor" in Baldwin's firing cannot supercede its unanimous finding that Baldwin was not fired "because of" his race.

Even if the state court of appeal was wrong in finding that the "yes" answer to the "determining factor" interrogatory was insufficient to constitute a verdict of mixed-motives discrimination, the court of appeal was certainly correct in finding that the jury's answers to interrogatories, taken *together*, do not support a verdict of discrimination. This is because the jury unanimously found that Baldwin *was not* fired "because of" his race, and this finding hopelessly conflicts with any "verdict" for Baldwin on mixed-motives discrimination.

Mixed-motives discrimination is a species (or subset) of discrimination, so no employer can be liable for mixed-motives discrimination while simultaneously not being liable for discrimination because of race. The contradiction cannot be reconciled. Therefore, the mixed-motives "verdict" cannot possibly stand. *See* LA. CODE CIV. PROC. ANN. art. 1813(E) (West 2009) (barring courts from entering a judgment when any answers to interrogatories are inconsistent with the general verdict).

The only way that the contradiction could be reconciled is if the jury's finding that race was a

"determining factor" in the firing somehow overrides the jury's unanimous finding that Baldwin was not fired because of race. But if either interrogatory must control over the other, surely the "because of race" question trumps, given that it is the only question that tracks the statutory language (of both Title VII and Louisiana's statute) making it unlawful to fire someone "because of" race.

The irreconcilable conflict between the jury's answers is further revealed by an analysis of the word "determine." "Determine" means "to fix conclusively or authoritatively," or "to direct or control." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 616 (3d ed. 1961). Thus, in a firing context, a determining factor is something that fixes, directs, or controls the firing; the firing is done "because of" the "determining factor." In this context, there is no difference between the two expressions.

Moreover, "determining factor" does not mean the same thing as "motivating factor," and thus is inappropriate language for a true mixed-motives verdict form. As can be inferred from the definition given above, to say that race was a "determining factor" in a firing necessarily implies that race was a *dispositive* factor in the firing. But there is no such requirement (and never has been) in the law of mixed motives. *See Price Waterhouse*, 490 U.S. at 240 (rejecting a requirement that a plaintiff show that the impermissible factor was a "but for" cause of the employer's decision); *see also* 42 U.S.C. § 2000e-5(g)(2)(B) (allowing certain

forms of liability even when the employer shows that the impermissible motivation was not dispositive of its decision). Because a "determining factor" interrogatory, unlike a true mixed-motives interrogatory, does not allow for the possibility that race was a factor but not a dispositive factor, the "determining factor" interrogatory is just an awkward restatement of the "because of race" interrogatory. The two interrogatories ask the same thing, so contradictory answers to these essentially equivalent questions cannot support a judgment.

Thus, even assuming that the state court of appeal erred in holding that the jury's finding that race was a determining factor in Baldwin's firing did not, in itself, constitute a "complete" mixed-motive verdict, any such error was irrelevant. A "verdict" for Baldwin on the mixed-motives claim is plainly inconsistent with the verdict that he was not fired because of his race. The court of appeal correctly found that the jury's answers, taken as a whole, cannot support a judgment of racial discrimination.

CONCLUSION

The state court of appeal was certainly correct in holding that the jury's answers to interrogatories do not support a judgment of a discriminatory firing. Even if the court of appeal was wrong in concluding that the jury's "yes" answer to the "determining factor" question was not a verdict for Baldwin, any such

"verdict" cannot support a judgment for Baldwin because it hopelessly conflicts with the jury's unanimous finding that Baldwin was *not* fired because of his race. Thus, if there was any error in the court of appeal's mixed-motives analysis, the error was harmless, and hardly forms a "compelling" basis for this Court to grant Baldwin's writ application. And there is no preemption issue because there is no conflict between the law that was applied and the law that Baldwin thinks should have been applied. This Court should therefore deny this writ application, taxing all costs to Baldwin.

Respectfully submitted,

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